

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BENITO REYES,

Defendant and Appellant.

G040778

(Super. Ct. No. 05NF3894)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

James M. Crawford for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald Jakob and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

An armed security guard shot and killed Raymond Cazessus, defendant Benito Reyes's fellow gang member, after defendant and Cazessus confronted and threatened the guard. A jury found defendant guilty of attempted murder, murder, and street terrorism, and also returned findings on the attempted murder charge that he personally discharged a firearm and committed it for the benefit of, at the direction of, or in association with a criminal street gang. Based thereon, the superior court sentenced defendant to 52 years to life in prison. Defendant challenges the sufficiency of the evidence on several grounds, attacks the trial court's instruction of the jury in two respects, and claims the court erred by denying his motion for a mistrial. Finding no prejudicial error, we shall affirm the judgment.

FACTS

Fidel Medina worked as an armed security guard at an apartment complex in a neighborhood claimed by a criminal street gang named La Jolla. While speaking with two young girls in the complex's parking lot around 9 p.m., Medina saw La Jolla gang member Cazessus walking towards him. Cazessus was pounding a fist into the palm of his other hand, and saying "What's up rent-a-cop? What's cracking?" About the same time, Medina saw defendant crossing the street, yelling "Chester, child molester[.] I'm going to call the police."

Medina testified he observed at least two other persons nearby wearing what he described as "gang-banger attire." There was other testimony and evidence that additional La Jolla gang members were also in the area at the time.

Both Cazessus and defendant approached within several feet of Medina, standing in front of him with Cazessus to the right and defendant on the left. A female approached defendant and asked him what he was doing. Defendant then said to Medina, "You're not the only one who has a gun. I have a gun too." He displayed a .45 caliber

handgun and pulled the slide back to chamber a round. Medina placed his hand on his own 9 millimeter weapon and told defendant to put the .45 caliber handgun away.

Defendant responded, "I'm not afraid of you. I'll bust a cap in your ass right now." He then raised the weapon and fired at Medina. Medina drew his weapon and fired back. The two of them began retreating as they fired their guns.

After the shooting, Cazessus lay dying on the grass outside the apartment complex. He had been hit by two bullets from Medina's gun. Defendant lay wounded on the opposite side of the street, having been struck nine times. One police officer testified that upon arriving at the scene of the shooting, he saw a woman kneeling next to defendant's body. Paramedics rushed defendant to a hospital where he was placed on a ventilator and operated on five times over the ensuing 10 days.

The police found a .45 caliber handgun within several feet of Cazessus's body. Investigators located numerous expended cartridges for 9 millimeter and .45 caliber handguns, plus one unfired .45 cartridge casing.

Both defendant and Cazessus were tested for gun shot residue (GSR). Cazessus's hands tested positive for it while no GSR was found on defendant's hands. The test of defendant's hands did not occur until after his initial surgery, and the parties stipulated a police detective present at the scene would testify the plastic bags placed on defendant's hands before he was transported to the hospital, were missing when defendant emerged from surgery.

The prosecution introduced a tape recording and transcript of statements defendant made to another gang member at juvenile hall several months later. During the conversation, defendant claimed that before the confrontation, "Huggies" (Cazessus's gang nickname) said in reference to Medina, "Let's go fool. . . . Let's fuck him up." Defendant also acknowledged "Huggies [wa]s next to me" during the confrontation, that defendant "had a strap (i.e., gun)" "in my pocket," which he "cocked." After the

shooting, defendant claimed, “I got the strap, . . . put it down, . . . took off the gloves and put the gloves down . . . next to the strap and I walk[ed] up . . . [the] hill”

Police sergeant Daron Wyatt testified as a gang expert. He described La Jolla as a turf-oriented traditional Hispanic street gang, identified the territory claimed by the gang, and explained its history, graffiti, hand signs, size, plus its primary criminal activities. Through Wyatt, the prosecution also introduced the records of two prior convictions based on felonies committed by La Jolla gang members involving a June 2005 assault with a deadly weapon and an August 2004 robbery.

Based on his personal involvement with defendant and a review of police records concerning other contacts with him, Wyatt opined defendant was an active participant in La Jolla. Wyatt cited what he described as “16 . . . gang-related contacts by law enforcement” with defendant between August 2004 and September 2005, many of which involved defendant “in the company of other known self-admitted members of . . . La Jolla” During the police contacts defendant said he associated with La Jolla members and would back up the gang in a fight. Wyatt also cited two June 2005 arrests of defendant, the first of which involved selling marijuana with another La Jolla member, and a second involving assault with a deadly weapon that was committed with six other gang members. An acquaintance of defendant testified he once told her that he was “down for La Jolla,” which meant “he was going to be always for the gang.”

Wyatt also opined the confrontation of and shooting at a security guard within the gang’s territory was committed for the benefit of the street gang. “[I]t’s exerting control over the neighborhood. The security guard is there for a purpose, to protect . . . property The gang members are . . . showing that they have no regard for that . . . and . . . the bolstering of the reputation of the individual member and the gang itself [by] complet[ing] a violent act against a uniformed security guard.”

DISCUSSION

1. Sufficiency of the Evidence

a. Introduction

Defendant raises insufficiency of the evidence claims against all three of the substantive charges and the two enhancement allegations.

The standard of review for such appellate claims is well established.

“‘When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.] ‘This standard applies whether direct or circumstantial evidence is involved.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

b. Attempted Murder, Murder, and Personally Discharging a Firearm

On the attempted murder and murder counts, and the true finding for the personal discharge of a firearm allegation, defendant argues the verdicts and finding must be reversed because “[s]ubstantial factual evidence . . . points to Cazessus . . . as the gunman who fired [at] . . . Medina,” thereby “undermin[ing] the jury’s verdict[s and finding].”

First, we note defendant waived this contention by presenting only a limited and one-sided summary of the trial evidence. “Perhaps the most fundamental rule of

appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, . . . the defendant . . . must *affirmatively demonstrate* that the evidence is insufficient." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

Defendant's argument focuses on the discovery of the .45 caliber weapon near Cazessus's body, whereas the "[p]olice never found a gun in [his] possession" or his fingerprints on the recovered gun, plus the fact the "[p]olice . . . found Cazessus had GSR on his hand," but "[n]o GSR was found on [defendant's hands]." Not only does this argument ignore Medina's testimony identifying defendant as the gunman, but it also ignores other evidence supporting the jury's verdict.

Juan Ceja, an eyewitness, testified he saw three individuals confront the security guard and that one of them, wearing "dark clothes," pulled something out of his clothing. Ceja then saw a flash and heard a loud bang. The trial testimony shows defendant was wearing a dark sweatshirt, while Cazessus wore a white T-shirt. Defendant also conveniently ignores his own admissions that he carried a weapon, which he used, and wore gloves during the shooting. Finally, he fails to mention the test of his hands for GSR did not occur until after he emerged from several hours of surgery during which the plastic bags covering his hands had been removed.

An appellant cannot succeed on an insufficiency of the evidence claim "by citing only his own evidence, or by arguing about what evidence is *not* in the record, or by portraying the evidence that is in the record in the light most favorable to himself." (*People v. Sanghera, supra*, 139 Cal.App.4th at p. 1573.) "[T]o prevail on a sufficiency of the evidence argument, the defendant must . . . set forth in his opening brief *all* of the

material evidence on the disputed elements of the crime in the light most favorable to the People, and then must persuade us that evidence cannot reasonably support the jury's verdict. [Citation.] If the defendant fails to present us with all the relevant evidence, or fails to present that evidence in the light most favorable to the People, then he cannot carry his burden of showing the evidence was insufficient because support for the jury's verdict may lie in the evidence he ignores." (*Id.* at p. 1574.) Here, defendant failed to comply with this requirement.

Second, Medina's testimony alone sufficed to support the jury's verdict. Defendant claims "Medina . . . never testified he saw [defendant] fire at him." This argument misstates the record. On direct examination, the prosecutor asked Medina, "[W]hen you say, 'engaged the threat,' what did you do? [¶] . . . [¶] A I drew my weapon and I aimed at the threat, . . . and started shooting back at him. [¶] Q And who was that threat? [¶] A The defendant. [¶] Q And is there any doubt in your mind as to who was shooting his weapon at you? [¶] A No, sir."

It is true that one eyewitness testified the person who fired at Medina was wearing a white T-shirt. But "[a]s with other facts, the direct testimony of a single witness is sufficient to support a finding unless the testimony is physically impossible or its falsity is apparent 'without resorting to inferences or deductions.' [Citations.] Except in these rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution" (*People v. Cudjo* (1993) 6 Cal.4th 585, 608-609.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Consequently, defendant's attack on his attempted murder and murder convictions lacks merit.

The same result applies to defendant's claim concerning the personal discharge of a firearm allegation. Defendant also argues the prosecution failed to establish the requirements of Penal Code section 12022.53, subdivision (e)(1)(A) (all further statutory references are to the Penal Code unless otherwise indicated). That subdivision imposes the enhancement on "any person who is a principal in the commission of an offense" if "[t]he person violated subdivision (b) of Section 186.22," and "[a]ny principal in the offense" discharges a firearm. But the prosecution did not seek to impose vicarious liability on defendant for another gang member's discharge of a firearm. Rather, it relied on section 12022.53, subdivision (c), which imposes a 20-year prison term on "any person who, in the commission of a [specified] felony . . . , personally and intentionally discharges a firearm" As noted, the evidence supports the jury's finding defendant intentionally shot at Medina during the confrontation.

c. Street Terrorism and Street Gang Enhancement

Next, defendant attacks the evidentiary sufficiency for both his street terrorism conviction and the jury's true finding on the gang enhancement allegation.

Section 186.22, subdivision (a) makes it a crime for "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang" The crime "has three elements. Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive," "knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity," and "the person [must] 'willfully promote[], further[], or assist[] in any felonious criminal conduct by members of that gang.' [Citation.]" (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

Defendant argues "there was no testimony that [he] was an active participant, member or associate in . . . La Jolla" Active participation is established

where a defendant's "involvement with [his] criminal street gang . . . is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) Defendant's statements about his involvement with La Jolla, his prior police contacts and arrests, many of which occurred while he was in the company of known and admitted La Jolla members, and his admission that he was "down" for La Jolla, support a conclusion defendant was an active participant in the gang. As with insufficiency of evidence claims generally, "the sufficiency of the evidence showing active participation is not altered by the existence of other evidence offered by [a] defendant to show he was not an active participant in the gang. Resolution of conflicting evidence and credibility issues was for the jury to decide. [Citation.]" (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.) The same evidence also supports the second element, that defendant knew about La Jolla's criminal activity.

The third element requires proof the defendant "'willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of that gang.' [Citation.]" (*People v. Lamas, supra*, 42 Cal.4th at p. 523.) This element exists "where the defendant bears individual culpability for 'a separate felony offense committed by gang members.' [Citation.]" (*People v. Salcido* (2007) 149 Cal.App.4th 356, 367.) It "applies to the perpetrator of felonious gang-related criminal conduct as well as to the aider and abettor." (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.) Here "'[t]he evidence supports a reasonable inference that the [attempted murder of Medina] w[as] intended by [defendant] to promote, further and assist the gang in its primary activities—the commission of criminal acts and the maintenance of gang respect.' [Citation.]" (*People v. Salcido, supra*, 149 Cal.App.4th at p. 368.)

Defendant challenges the conviction on the ground "the prosecution failed to establish . . . the offense was committed for the benefit or, at the direction of, or in association with La Jolla." This is not an element of the substantive charge. Thus, the guilty verdict on count 3 is supported by the evidence.

As for the gang enhancement, subdivision (b) of section 186.22 imposes additional punishment on “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” “The substantial evidence standard of review [also] applies to section 186.22 gang enhancements. [Citations.]” (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.) Thus, “[w]e view the evidence in a light most favorable to the judgment. [Citations.]” (*Id.* at p. 366.)

First, defendant contends “there was no evidence . . . [he] was an active member” or “participant . . . in . . . La Jolla” Although, as discussed above, the evidence does support such a finding, the Attorney General is correct in asserting, that since the enhancement applies to any “*person . . . convicted of a felony*” (§ 186.22, subd. (b), italics added), it “does not require that the defendant be an active or current member of the criminal street gang that benefits from his crime. [Citation.]” (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1402; see also *People v. Martinez, supra*, 158 Cal.App.4th at p. 1332.)

Defendant further contends “[t]here was no evidence [he] possessed the requisite specific intent to assist in criminal conduct by gang members,” or that he “intended to commit a crime with the specific intent to promote, further, or assist La Jolla.” “[T]he prosecution must prove that the crime for which the defendant was convicted had been ‘committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.’ [Citation.]” (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617; *People v. Williams* (2009) 170 Cal.App.4th 587, 625.) “[S]pecific intent to *benefit* the gang is not required. What is required is the ‘specific intent to promote, further, or assist in any criminal conduct by gang members’” (*People v.*

Morales (2003) 112 Cal.App.4th 1176, 1198; see also *People v. Leon* (2008) 161 Cal.App.4th 149, 163.)

“[T]o prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs. [Citation.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) *People v. Williams, supra*, 170 Cal.App.4th 587 held expert testimony on how the possession of drugs by gang members benefited the gang “amply supported the true finding[] on the gang enhancement allegation[.]” (*Id.* at p. 625.) Here, Wyatt explained how a gang member’s confrontation of and threatening a security guard protecting property in an area claimed by La Jolla would benefit the gang.

Furthermore, as in *People v. Morales, supra*, 112 Cal.App.4th 1176, the enhancement allegation could be upheld solely because defendant committed the attempted murder with at least one other La Jolla gang member. “The crucial element . . . requires that the crime be committed (1) for the benefit of, (2) at the direction of, or (3) in *association* with a gang. . . . Thus, the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crime[] in association with fellow gang members.” (*Id.* at p. 1198.)

Consequently, the evidence supports defendant’s conviction on all three counts and the true findings on the gang and personal discharge of a firearm allegations.

2. *Jury Instructions*

a. Introduction

As discussed, the evidence reflects defendant, along with Cazessus and possibly other gang members, confronted Medina, calling him names. At one point, defendant displayed a gun, pulled back its slide, threatened to shoot Medina, and then fired at him. In response, Medina pulled out his own gun and began shooting, striking

both men and killing Cazessus. Thus, the prosecution sought to convict defendant of murder for Medina's killing of Cazessus under the provocative act murder doctrine.

Under this doctrine, "[w]hen the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. In such a case, the killing is attributable, not merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life [T]he victim's self-defensive killing or the police officer's killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for it is a reasonable response to the dilemma thrust upon the victim or the policeman by the intentional act of the defendant or his accomplice. [Citations.]" (*People v. Gilbert* (1965) 63 Cal.2d 690, 704-705, vacated on other grounds in *Gilbert v. California* (1967) 388 U.S. 263, 274 [87 S.Ct. 1951, 18 L.Ed.2d 1178]; see also *People v. Cervantes* (2001) 26 Cal.4th 860, 867-868; *People v. Washington* (1965) 62 Cal.2d 777, 782.)

The trial court instructed the jury on the provocative act murder doctrine, giving CALCRIM No. 560. It explained defendant could be convicted of murder if "[i]n attempting to commit murder, [he] intentionally did [the] provocative act" of "shooting at Fidel Medina," that "defendant knew . . . the natural and probable consequences of th[is] . . . act were dangerous to human life and . . . acted with conscious disregard for life," "[i]n response . . . , Fidel Medina killed Raymond Cazessus," and "Cazessus' death was the natural and probable consequence of the defendant's provocative act."

However, in light of the evidence at trial, the court also instructed the jury on the concepts of aider and abettor liability and self-defense or defense of others as a basis for both an acquittal of or to reduce count 2 from murder to voluntary manslaughter. Defendant contends the trial court committed instructional error in two respects. First, by instructing the jury he could be convicted of murder as an aider and abettor to a

provocative act by Cazessus. Second, the court failed to instruct the jury that if it found defendant did not plan on shooting Medina or form the intent to kill the guard, he could only be found guilty of voluntary manslaughter.

b. Defendant's Liability for Murder as an Aider and Abettor

After explaining the general principles of aiding and abetting, including the natural and probable consequences doctrine, the court informed the jury defendant could be found “guilty of murder if the People have proved that the defendant aided and abetted attempted murder and that [the] murder of Raymond Cazessus was the natural and probable consequence of the attempted murder of Fidel Medina.” Defendant argues the aiding and abetting instructions were legally erroneous because they allowed the jury to find him guilty of murder under the provocative act murder doctrine even if they believed Cazessus committed the provocative act of shooting at Medina.

We agree with defendant's analysis. In *People v. Antick* (1975) 15 Cal.3d 79, disapproved on another ground in *People v. McCoy* (2001) 25 Cal.4th 1111, 1123, the defendant and an accomplice named Bose committed a burglary. Stopped by the police shortly thereafter, Bose initiated a gun battle with the police and was killed by an officer. The Supreme Court reversed the defendant's murder conviction finding, as a matter of law, he could not be criminally responsible for Bose's death.

“It is well settled that Bose's conduct in initiating a shootout with police officers may establish the requisite malice. As we have noted on a number of occasions, a person who initiates a gun battle in the course of committing a felony intentionally and with a conscious disregard for life commits an act that is likely to cause death. [Citations.] However, Bose's malicious conduct did not result in the unlawful killing of *another* human being, but rather in Bose's own death. The only homicide which occurred was the justifiable killing of Bose by the police officer. Defendant's criminal liability certainly cannot be predicated upon the actions of the officer. As Bose could not

be found guilty of murder in connection with his own death, it is impossible to base defendant's liability for this offense upon his vicarious responsibility for the crime of his accomplice.” (*People v. Antick, supra*, 15 Cal.3d at p. 91.)

In this case, if the jury believed Cazessus had a gun and initiated the gun battle with Medina, while his conduct would suffice to establish the element of malice, since Cazessus could not be convicted of murder for his own death, neither could defendant be convicted of murder on an aiding and abetting theory. Nor is there any evidence a third gang member committed a provocative act leading to the shootout. Consequently, we agree with defendant the trial court's instructions on his potential liability for murder as an aider and abettor were legally erroneous.

The issue then presented is whether the erroneous instructions prejudiced defendant. “Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict. [Citations.]” (*People v. Chun* (2009) 45 Cal.4th 1172, 1201; see also *Hedgpeth v. Pulido* (2008) 555 U.S. ___, ___ [129 S.Ct. 530, 532, 172 L.Ed.2d 388] [“harmless-error analysis applies to instructional errors” concerning “multiple theories of guilt” where one of them is improper “so long as the error at issue does not categorically “vitiat[e] all the jury’s findings””].)

Relying on *People v. Guiton* (1993) 4 Cal.4th 1116, defendant argues this instructional error requires reversal. “[A] mistake about the law . . . generally require[s] reversal,” because “[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.” (*Id.* at p. 1125.)

But *Guiton* does not mandate reversal whenever a trial court gives the jury

legally erroneous instructions. “In determining whether there was prejudice, the entire record should be examined, including . . . the entire verdict. [Citation.] Furthermore, instruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and the invalid ground, there would be no prejudice, for there would be a valid basis for the verdict.” (*People v. Guiton, supra*, 4 Cal.4th at p. 1130; see also *People v. Chun, supra*, 45 Cal.4th at p. 1203 [reiterating that “reliance on other portions of the verdict is “[o]ne way” of finding an instructional error harmless”].)

Here, the jury’s finding on personal discharge of a firearm enhancement reflects the jury found defendant guilty of personally firing the gun. The court instructed the jury that it could return a true finding on the allegation only if it found beyond a reasonable doubt that “defendant personally discharged a firearm during the commission of the” attempted murder and that he “intended to discharge the firearm.”

Given this finding, it is clear the jury did not solely rely on the erroneous aiding and abetting instructions to convict defendant of murder. “The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.’ [Citation.]” (*People v. Chun, supra*, 45 Cal.4th at p. 1204.) Thus, “[i]f other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary for” finding defendant personally committed the provocative act of shooting at Medina, “the erroneous [aider and abettor] instruction[s] w[ere] harmless.” (*Id.* at p. 1205.) The trial court’s instructional error was thus harmless.

c. Failure to Give Alternative Voluntary Manslaughter Instruction

As noted, the court instructed the jury on the concept of imperfect self-defense or imperfect defense of another to reduce the crime of murder to voluntary manslaughter.

Citing a footnote in *People v. Cervantes*, *supra*, 26 Cal.4th 860, defendant notes a person's criminal liability for "unlawful conduct . . . proximately caus[ing] an intermediary to kill through a dependent intervening act . . . will be fixed in accordance with his criminal mens rea." (*Id.* at p. 873, fn. 15.) Thus, "[i]f the defendant proximately causes a homicide through the acts of an intermediary and does so with malice . . ., his crime will be murder . . .," but the crime of a "defendant [who] proximately causes a homicide through the acts of an intermediary . . . without malice, . . . will be manslaughter" (*Ibid.*)

Based on this, defendant again claims "[t]here was substantial evidence Cazessus . . . fired the shots which Medina described" Alternatively, defendant argues "assuming [he] exhibited a gun that has never been accounted for, had [he] not planned on shooting Medina or formed the requisite intent to kill, the homicide of Cazessus would have been voluntary manslaughter instead of murder."

As for defendant's continued reliance on the theory Cazessus was the gunman, as just discussed, if true, defendant could not be convicted of any form of homicide for his death. Nor does defendant's alternative theory support an additional instruction on facts that could reduce murder to manslaughter.

"The trial court must instruct on lesser offenses necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1064.) "Accordingly, the trial court [is] obligated to instruct on . . . a lesser included offense . . ., even in the absence of a request [citation], if the evidence had raised a question as to whether all of the elements of [the charged crime] were present and if there was evidence that would have justified a conviction of the lesser offense. [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 514.) But, "'if there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions [on lesser included offenses] shall not be given.' [Citations.]" (*Ibid.*)

First, we note there is insufficient evidence supporting the existence of a second gun. The mere fact Cazessus had GSR on his hands is not enough. The prosecution's forensic expert on GSR analysis merely meant a person has "been involved with a firearm in a number of different ways," including "being in the general vicinity of a gun[] going off. [¶] . . . So you could just be standing in close proximity and get those particles on your hands."

Second, it is not legally possible defendant could have fired the gun without the requisite mens rea for murder. "The requirement of an independent provocative act [for the provocative act murder doctrine] has grown up in the context of felonies [usually robberies] which do not themselves inherently involve an intent to kill." (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59.) "Although cases involving deaths resulting from [felonies such as] robberies have continued to adhere to the requirement that the provocative act be independent of the [underlying felony] . . . , the . . . authorities and logic dictate a different approach when the underlying offense is attempted murder, such as here." (*People v. Gallegos* (1997) 54 Cal.App.4th 453, 460.)

In *Aurelio R.*, a juvenile and his fellow gang members drove into a rival gang's neighborhood firing at homes and a car. A rival gang member returned fire, killing one of the juvenile's accomplices. The Court of Appeal upheld a finding the juvenile was guilty of murder for his fellow gang member's death. "The felony the appellant intended to and did commit satisfies that element of this specie of murder. He and his fellow gang members went into this with an intent to commit acts which were likely to cause someone else's death and with knowledge there was a high probability of retaliatory gunfire which might strike or even kill one of their own. Thus they provoked the acts which killed their accomplice just as surely as if they had started a firefight with law enforcement officers which produced the same death. Those who create these situations are as morally culpable if one of their own dies in the ensuing gun battle as if

they succeed in killing a rival gang member or a police officer.” (*In re Aurelio R.*, *supra*, 167 Cal.App.3d at p. 60.)

By confronting Medina, displaying a gun, threatening to use it, and then firing at Medina, defendant committed acts that established the element of malice. The court instructed the jury on justifiable homicide based on self-defense and defense of another, of imperfect self-defense or defense of another as a basis for reducing the homicide to manslaughter, and the effect of his possible intoxication on defendant’s ability to form the intent to kill. No evidence was presented providing a further basis to allow reducing the murder charge to manslaughter.

3. The Denial of Defendant’s Motion for a Mistrial

The prosecutor asked Wyatt if defendant was “licensed to carry a firearm?” Wyatt responded, “No, he’s specifically prohibited from doing so.” Defense counsel objected and moved for a mistrial, arguing Wyatt’s answer “creates an inference . . . that [defendant is] on some type of probation or supervisory conditions . . . because he has a prior record and a history of violence.” The trial court denied the mistrial request. But it sustained a relevance objection to the prosecutor’s question, struck Wyatt’s answer, and instructed the jury to not consider it. On appeal, defendant argues the trial court’s ruling was erroneous because Wyatt’s answer “impermissibly exposed the jury to already excluded evidence concerning [defendant’s] prior conviction.”

“In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. [Citation.] ‘A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]’ [Citation.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.)

The record supports the trial court's decision in this case. Wyatt did not specifically mention defendant's prior criminal record. Furthermore, in light of Wyatt's testimony about defendant's prior police contacts and arrests, which are not challenged in this appeal, it is unlikely Wyatt's comment defendant was specifically prohibited from carrying a firearm was particularly inflammatory. Finally, the court sustained an objection to the question, struck Wyatt's answer and told the jury "[w]hether the defendant is licensed to carry a firearm or is not permitted to carry a firearm is really not a matter for your consideration with respect to any issue in this . . . case," and "do not consider it." "We assume the jury complied with [the court's] admonition." (*People v. Sapp* (2003) 31 Cal.4th 240, 300.)

Defendant has thus failed to establish the trial court abused its discretion by denying his motion for a mistrial.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.